IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF RHODE ISLAND

UNITED STATES OF AMERICA	C.R. NO. 06-13T
VS.	APRIL 5, 2006 10:00 A.M.
ROBERT TAYLOR	PROVIDENCE, RI

BEFORE THE HONORABLE ERNEST C. TORRES,

CHIEF JUDGE

(Motion to Suppress -- EXCERPT)

APPEARANCES:

FOR THE GOVERNMENT: LEE VILKER, AUSA
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FOR THE DEFENDANT: KEVIN J. FITZGERALD, ESQ.
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5 APRIL 2006 -- 10:00 A.M.

BEGINNING OF EXCERPT

THE CLERK: This is Criminal Action 06-13T, United States of America versus Robert Taylor.

THE COURT: There are several motions that have been filed, three, I believe, to be exact, two of which I believe are now moot.

We have, first of all, the Defendant's motion to suppress evidence, which is certainly not moot; but we also had the Defendant's motion to issue subpoenas for records of the Providence Police Department and to the Providence external review authority.

And the City of Providence has filed a motion to quash those subpoenas, but it's my understanding those motions have been withdrawn. Is that right, Mr. Fitzgerald?

MR. FITZGERALD: That's correct. The motions were withdrawn at the last calendar call. I issued a subpoena to the -- two subpoenas, actually, to the Providence Police Department to bring those documents here today.

The reason I did that is because, by the time I had -- maybe the Court will recall, I was trying to investigate whether or not there were actual adjudications against these officers out there.

Once I got at least confirmation for my satisfaction, by that time I didn't think we had enough time to file -- refile the motion. So I filed -- I served the subpoena to have Providence show up here today with those documents.

My understanding, and the response to my subpoena and the motion to quash, is that there's one adjudication against Officer Zincone; and all I'm asking for is the Court to review that -- those documents in-camera, and they either are relevant or not relevant in the matter here. I believe they will be relevant, and I can address that now if you'd like.

THE COURT: Why don't you. Yes.

MR. FITZGERALD: Your Honor, I believe they'll be relevant in several different ways. The first is, I believe that the documents will show a -- will show evidence of a pattern of conduct by this police officer, that he does make searches or initiates interaction in searches with people, with individuals out on the street without due cause, either articulable suspicion or probable cause, essentially that he's overaggressive.

The other thing that I believe it will show is if in the course of that hearing he did testify and he was not believed by the hearing officer, then of course it would be relevant to go against his credibility.

Now, your Honor, two other things. One is that I believe this adjudication's about four or five years old. However, that time period would still be in a time period where the Court could consider a criminal conviction, so I don't think it's too far in time for the Court to consider that adjudication.

And lastly, your Honor, Providence in their motion to quash had asserted a privilege, that these documents were covered by a privilege. I'm not sure that's the case. And beyond that, your Honor, I believe that they've already turned over the documents -- I'm sorry, I know they've already turned over the documents to the Government. So I would say if there is a privilege, that privilege is now extinguished.

So for all those reasons, your Honor, I believe that the Court should take a look at these documents and determine whether or not I can use them to cross-examine Officer Zincone.

THE COURT: Mr. Vilker.

MR. VILKER: Your Honor, not that this is dispositive, but we do have an objection to the procedure in which this has taken place.

Last time we were before the Court, the -- your

Honor denied the motion or it was withdrawn, and the defense was given an opportunity to file an additional motion with the Court to serve the Rule 17(c) subpoena, assuming they could get more particularized information.

Your Honor expressed a concern that Defendants not be allowed to do this in every case and if the defense was allowed to get more detail regarding this particular allegation, then your Honor would reconsider allowing the subpoena to be sent.

Instead of coming back to the Court and requesting additional permission and moving again under Rule 17, the defense just simply served a subpoena and put Providence in the position of showing up here and having to move to quash it.

I have the records. I received them yesterday. Providence Police have informed us that of the three officers, there's something -- about 37 different complaints that have been filed and 36 adjudications of not guilty.

Mr. Fitzgerald has informed us that he's no longer requesting any of the records other than the one finding concerning Officer Zincone in which there was a guilty finding and which resulted, in my understanding, in a one-day suspension.

The Government does not believe that that particular offense goes in any way to credibility. I don't really feel comfortable discussing the details of it on the open record, but at the end of the day we don't have an objection at this point to, I have the documents with me, to providing them to the Court to review in-camera.

The Government's view is the incident concerned an allegation of an improper search in which there was an allegation of some kind of public humiliation. This is one incident back in July of 2000. It's the only incident this officer's ever been disciplined for in a 13-year career.

So we strongly object to the argument that this suggests a pattern of conduct that is at all relevant, and the question is not whether -- even if there was some kind of pattern of conduct, the ultimate relevance of it, which is really a different question in terms of whether this is *Giglio*, the actual relevance of it to be admitted in this hearing or, if this case proceeds to trial, at trial is does this go to -- this prior act go to the credibility of the witness.

And the fact that a prior act occurred which he was accused of and ultimately there was a disposition that he did commit an improper search on one prior occasion doesn't make his testimony in this case any less truthful.

What the defense is -- this is really governed by Federal Rule of Evidence 608, which they're trying to get in a prior, quote, unquote, "bad act," and you can't do that unless it goes to credibility.

And apart from all of that, even if there was any relevance, the Government's position would be that particular -- getting into that particular evidence would really sidetrack this case because the officer has a very detailed explanation of what went on that day, and I think it would open the door to a lot of other evidence about this officer's credibility that really has absolutely nothing to do with the facts of this case.

So the Government's view would be, even if it's somehow relevant to credibility, which we don't believe it is, it would be prejudicial and confusing and misleading under Rule 403 and should be excluded.

With all that being said, the Government's position as of now is we have the documents and we're prepared to provide them to your Honor as the defense requested for an in-camera inspection; and our view is that the allegations and the finding did not relate at all to this officer's credibility but concerned specific conduct of the date of this complaint regarding how the search was conducted on that occasion.

THE COURT: Is Officer Zincone going to testify?

MR. VILKER: Yes, he is, your Honor.

THE COURT: You've looked at these records?

MR. VILKER: I have. I received them yesterday.

THE COURT: You say that there were 37 complaints and --

MR. VILKER: All I have looked at is the one complaint in which there was an adjudication of guilty.

THE COURT: Was the -- did the adjudication relate to the manner in which the search was conducted or what Officer Zincone said occurred?

In other words, was it a situation where the facts were relatively undisputed, shall we say, and the hearing officer found that this was improper action, or was it a situation in which Officer Zincone said one thing and the complainant said the other and the hearing officer found in favor of the version given by the complainant?

MR. VILKER: The latter. Officer Zincone denied what the complainant says occurred, and the hearing officer never made a finding that Officer Zincone was not credible. He made a finding that he believed the testimony of the complainant and suggested a two-day suspension, which I think was later downgraded to one day.

THE COURT: Mr. McHugh, are you here to -- do you wish to be heard on this?

MR. McHUGH: Just briefly, your Honor. I filed the -- Senior Assistant City Solicitor Kevin McHugh for the City of Providence. I filed the motion to quash because routinely we do in cases where personnel records are subpoenaed. And I won't repeat what's in my memo, but the basis for that is twofold: The privilege of the personnel records, and I always cite the leading case on that, Burke versus the NYPD, which is the leading case on federal courts deciding whether or not to turn over personnel records, that happens to be in a civil rights context, but it's the closest thing to it, and also the DARE, that's D-A-R-E, versus Gannon because this request once it became narrowed down to this one civilian complaint is the exact same files that they're talking about and that were the subject of the DARE complaint at the Supreme Court in which the Supreme Court said we only have to give out the hearing officer's findings, final decision when there is final action, which there was in this case, with the names redacted.

So I didn't want to turn over anything -- just anybody's personnel records without a waiver from the individual employee that it was okay to do so, and so I filed the motion to quash.

THE COURT: Can you confirm what Mr. Vilker was unable to confirm, that Officer Zincone has been on the force for something like 13 years and that of the 37 complaints filed against him in that period of time, only one was found to have merit?

MR. McHUGH: Actually, there were -- in response to the entire subpoena, out of all three officers, there's a total of 35 complaints spread out among the three officers. Only one of the 35 complaints had a guilty finding, and that guilty finding involved Officer Zincone. So there weren't 35 complaints against Officer Zincone.

THE COURT: All right. Mr. Fitzgerald, do you have any reason to believe that there's been more than one incident in which a finding was made that Officer Zincone made an improper search or possibly could -- or was found at least by the hearing officer to have given a version of the events that was different from what the hearing officer concluded actually occurred?

MR. FITZGERALD: I don't have any information that there's any other adjudications against him, no.

Complaints, but not adjudications.

THE COURT: All right. Well, I suppose the easy thing in this case for the Court to do would be to examine the records in-camera; but the Court, for reasons I think I previously have expressed, is reluctant to set that precedent.

If that were the case, if every time there was an arrest or a search the Defendant was allowed to go through the personnel records of the officer or officers involved or at least require that the Court review these records in-camera, I don't think I'd be doing much else but reviewing these records.

So there has to be some threshold showing made that creates a reasonable belief that the records might be relevant to or admissible evidence in connection with some issue presented in the hearing before the Court, which in this case is the Defendant's motion to suppress.

And it appears that what we have here is a police officer who's been on the force for 13 years, has had some complaints, we don't know exactly how many, all we know is 35 complaints have been filed against all three of the officers in this case, but he's had some complaints filed against him and has had one determination made that he conducted an improper search; and it appears that in that case the complainant's testimony or the decision of the hearing officer hinged on whether the hearing officer accepted the complainant's version of what occurred or the officer's version of what occurred.

Now, first of all, the Defendant argues that there are two grounds on which this evidence might be admissible. One is that it establishes some kind of a custom or practice or habit on the part of Officer Zincone, and it seems to me that it clearly falls short of rising to that level. One finding in a period of 13 years certainly does not establish a habit, custom or practice of conducting improper searches.

Furthermore, whether a search is proper depends on two things, one, what happened, the facts; and, two, whether or not those facts are construed to have given rise to a reasonable suspicion or probable cause, whatever the applicable standard may be, on the part of the officer.

And certainly there's room for interpretation with respect to both of those prongs. Versions of factual testimony given by individuals that are involved in an incident often differs because of differences in perception. The fact that one party's version's accepted over another doesn't necessarily mean that there was a finding by the decisionmaker that the party was intentionally lying. Even if the decisionmaker made that determination, I don't think that that is admissible as evidence in this proceeding.

There's even greater room for variance in determining whether even undisputed facts establish reasonable suspicion or probable cause, and we have decisions by appellate courts and trial courts that construe situations that sometimes appear to be almost indistinguishable in one case as establishing probable cause or reasonable suspicion and in another case not.

So it's pretty easy to understand how not only decisionmakers but police officers may err innocently in determining whether or not a search is proper.

As far as the credibility issue is concerned, as I said, first of all, the fact that the decisionmaker found that the officer had acted improperly doesn't necessarily amount to a finding that the officer lied. And even if that was the opinion of the hearing officer, really one single such incident does not make it admissible evidence or probative evidence in this hearing in determining the officer's credibility.

I can decide the officer's credibility by listening to his testimony and by comparing his testimony to the other evidence and making my own determination as to its plausibility.

So there's no threshold showing that's been made here. I don't see any reason for the Court to review these records in-camera. I don't reach the question of privilege. I'm not too impressed, on the surface at least, Mr. McHugh, by the argument that these records are privileged.

If they are relevant to some issue in a hearing before the Court, you've got a pretty tall hill to climb in convincing me that they should be withheld on the grounds of privilege; but I don't reach that question, and the motion to suppress or to quash the subpoenas is granted.

All right. Since this was a warrantless search, the burden is on the Government to establish that the search was lawful. So we'll hear the evidence you have to present, Mr. Vilker.

END OF EXCERPT

C E R T I F I C A T I O N

I, Karen M. Zinni, RPR-RMR-CRR, do hereby certify that the foregoing pages are a true and accurate transcription of my stenographic notes in the above-entitled case.

Karen M. Zinni, RPR-RMR-CRR

4-13-06

Date